LORD PRESIDENT — We have had the advantage of a very full argument, but I must say that, having regard to the known practice and to the authorities cited, I see no ground for disturbing the result arrived at by the Auditor. The fees allowed are somewhat higher than those allowed generally or at all for proofs, and the fees sanctioned in cases of trial by jury are hardly analogous, but even if they were, they would not sustain or justify an interference with the decision of the Auditor.

I should suppose that among other things the Auditor considered that when counsel has once prepared himself in a case to which he is to give exclusive attention, his daily duties are somewhat lighter than if he had to prepare in a number of fresh cases every day. We must keep in view that the Auditor is a man of experience; that he is well acquainted with the practice and decisions of the Court. It seems to me that it would be a serious thing to increase the fees allowed by the Auditor, as by so doing we might be understood to fix a minimum, or at all events an ordinary standard of fees.

The same remarks apply to Mr Campbell's account. The way in which it is made up is unusual, full time being charged for things which do not look as if they would occupy whole days. But there are really no materials before us which enable us to consider that question.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court repelled the objections.

Counsel for the Pursuers—Salvesen, Q.C. —Clyde. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders—Ure, Q.C.—Younger. Agents—J. & J. Ross, W.S.

Thursday, October 25.

SECOND DIVISION.

HARGRAVE'S TRUSTEES *v.* SCHOFIELD.

Succession—Direction to Trustees to Retain Subject of Vested Right—Vesting—Repugnancy.

A testator directed his trustees to divide his estate equally among his nephews and nieces *nominatim*, the children of A and of B or their lawful issue, share and share alike, by roots, the share of any who might predecease the testator to accrue to the survivors. He further directed them, during the lifetime of B, to retain in their hands the capital of the shares belonging to B's children, and to pay to them the revenues thereof only.

Held (*diss.* Lord Young) that, as the fee of their respective shares of the estate had vested in B's children *a morte testatoris*, and there were no ulterior trust purposes to protect, the direction to the trustees to retain during B's lifetime was ineffectual, and that B's children were entitled to immediate payment of their shares.

Miller's Trustees v. *Miller*, December 19, 1890, 18 R. 301, *followed*.

Joseph James Hargrave, who died domiciled in Scotland on 22nd February 1894, left a will dated 31st July 1893 and made in Montreal, whereby he conveyed his whole estate to certain trustees for the purposes therein specified.

By the fourth purpose of his will the truster directed his trustees "to invest all the said residue of my said estate in interest-bearing securities, and to pay the revenues thereof to my stepmother Margaret Alcock Hargrave of Rutland Square in Edinburgh aforesaid, and my uncle Lockhart Mactavish of Otago in New Zealand, during their joint lives, share and share alike, and from and after the death of either to pay the whole of said revenues to the survivor during his or her lifetime. Upon the death of the survivor of my said stepmother and uncle, my said trustees shall divide my said estate equally between my nephews and nieces hereinafter named, to wit, Flora Mactavish Ogston, Mary Ogston, Francis Hargrave Ogston, and Walter Henry Ogston, children of Alexander Ogston, doctor of medicine of Aberdeen, Scotland, Lockhart Alexander Schofield, James Schofield, Frederick Joseph Schofield, Margaret Florence Schofield, Letitia Schofield, and Mary Schofield, children of Frederick Schofield, late of Brockville, Ontario, or their lawful issue, share and share alike, by roots, the share of any predeceasing me to accrue to the survivors. But I direct that during the lifetime of the said Frederick Schofield, my said trustees shall retain in their hands the capital of the shares belonging to the said Lockhart Alexander Schofield, James Schofield, Frederick Joseph Schofield, Margaret Florence Schofield, Letitia Schofield, and Mary Schofield, and shall pay to them the revenues thereof only."

The truster was survived by the said Mrs Hargrave and Lockhart Mactavish, and by the nephews and nieces mentioned in the said will, children of the said Alexander Ogston and Frederick Schofield.

Lockhart Mactavish died on 15th February 1899, and Mrs Hargrave on 5th June 1899, at which date the residue of the estate fell to be divided in terms of the will. Frederick Schofield was still alive.

A question having arisen as to the right of the children of Frederick Schofield to obtain immediate payment of the shares of residue destined to them, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees under the truster Joseph James Hargrave's will; (2) five of the children of Frederick Schofield, and the trust assignees of the remaining child.

The first parties contended that under the provisions of the said will they were not entitled to hand over the capital of said shares to the second parties until the death

of the said Frederick Schofield. The second parties contended that under the said will the shares destined to them had vested, and that as postponement of payment was not required in order to protect or provide for any present or ulterior interest or trust purpose, the provision postponing during the lifetime of the said Frederick Schofield payment of the shares of capital destined to his children was merely a restraint on their enjoyment of a fully vested right of fee in their respective shares, and as such fell to be disregarded as repugnant to, and inconsistent with, a right of fee.

The questions of law for the opinion and judgment of the Court were—"(1) Are the second parties entitled during the lifetime of the said Frederick Schofield to payment of the capital of the shares destined to his children named in the said will?" or "(2) Must the capital of said shares be retained in the hands of the first parties or their successors during the lifetime of the said Frederick Schofield, as provided in the said will?"

Argued for the first parties—The truster's direction to his trustees to retain the capital of the shares belonging to Frederick Schofield's children during his life. was unambiguous, and should receive effect. It was a condition which the truster had a right to impose. He was under no obligation to provide for these children. The case was not ruled by the decision in *Miller's Trustees*, relied on by the second parties.

Argued for the second parties—They were entitled to immediate payment of their shares. It was clear that they had a vested right of fee, and if so, it was well settled that no attempt to restrict that right could receive effect. It might be otherwise if there were ulterior interests to protect, but here there were none.—*Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301; *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136; *Stewart's Trustees* v. *Stewart*, December 14, 1897, 25 R. 302; *Ballantyne's Trustees* v. *Kidd*, February 18, 1898, 25 R. 621.

LORD JUSTICE-CLERK—I am unable to distinguish the question raised by this case from the question which was decided in *Miller's Trustees* and the series of decisions following on that case. I think we must give effect to these decisions, and that therefore the first question should be answered in the affirmative and the second in the negative.

LORD YOUNG—I think otherwise. I expressed my opinion at some length, adverse to the judgment of the majority of the Court, in the case of *Miller*. I repeated that opinion in the case of *Stewart*. I adhere to these views, and I think that the law, established long before the case of *Miller*, and as it now exists, is contrary to the judgment in that case. I am not and never have been of opinion that judges ought to follow what they consider to be an erroneous exposition of law. We are bound, I think, to give what we believe to be a true view of the law, and I think it is always legitimate to reconsider any matter without putting the parties to the expense of sending it to the Whole Court, or to Seven Judges. Indeed, that has been the course taken in this Court, and I need only cite as an instance the great variety of views taken by judges on these very questions of vesting. In construing a testamentary trust-deed what is to be looked at first is the will and intention of the truster. If his intention is lawful, and the expression of it leaves no doubt in the mind of the Court as to what it is, there is law, both upon unanimous decisions and in text writers of the highest authority, that that intention is to be given effect to. If there is anything to the contrary in the case of *Miller*, I prefer the old established doctrine to which I have referred. I think there is here a distinct expression of intention that the capital of the shares destined to the second parties is not to be paid to them till the death of their father. That being a lawful intention and distinctly expressed I think there is authority for our giving effect to it, and that there is nothing in the case of *Miller* that inclines me to be of a different opinion.

LORD TRAYNER—I agree that in construing testamentary writings the first thing to which regard should be had is the intention of the testator, and if I were reading the will now before us without reference to the decided cases, I should have thought that the intention of the testator was here clearly and definitely expressed to the effect that the second parties were only to get the revenue of their respective shares during their father's life, and the capital of such shares only after his death.

But the fee of these shares having (according to well-established rules) vested in the second parties *a morte*, the question is whether the testator could legitimately or effectually limit or restrict that vested fee to a liferent during the period of the father's life. My own opinion is that he could. But it was otherwise decided in the case of *Miller's Trustees* and subsequent cases. I dissented from the decision in *Miller's* case, and have not seen reason to change the opinion I then held. I am bound, however, to regard the question as at present authoritatively determined contrary to my opinion, and applying the rule so determined to the present case, must hold that the contention of the second parties is right and should prevail.

I do not share the opinion that a judge may disregard an authoritative decision simply because he does not concur in it. If each judge or each Court proceeded upon that principle our rules of law would become uncertain and confused. *Stare decisis* is a safer principle, so long as the precedent stands unreversed. I accordingly in this case give effect to the law as it stands upon the decided cases and out of deference to their authority.

LORD MONCREIFF—I think we are bound to follow the case of *Miller's Trustees*. This is a simple example of the kind of case which is ruled by that decision. There is no doubt that the residue has vested in the second parties, and the only question is whether a restriction of this kind on a vested right of fee, where there are no ulterior interests to be protected, can receive effect. Without expressing any opinion on the case of *Miller's Trustees*, I think we are bound to follow it. It was a decision of a Court of Seven Judges which has been followed in many cases, and if it is to be reconsidered it must be by the Whole Court.

The Court answered the first question in the affirmative, and the second question in the negative.

Counsel for the First Parties—D. Anderson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Second Parties—Chree. Agent—W. K. Aikman, W.S.

Saturday, October 27.

SECOND DIVISION.

BELL'S TRUSTEES *v.* THE HOLMES OIL COMPANY, LIMITED.

Company—Winding-Up—Voluntary under Supervision or by the Court — Creditor's Petition—Company Unable to Pay Debts — Wishes of Creditors — Cutting down of Preference—Preference to Creditors — Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 79, 84, 91, 130, *and* 164.

On 3rd October 1900 a creditor of a company, which it was admitted could not pay its debts, presented an application to the Court for the compulsory winding up of the company. They produced a disposition dated 15th August 1900, by which the company had disponed to a bank certain heritable property belonging to it.

On 22nd October certain other creditors lodged answers opposing the application on the ground (1) that the great body of the creditors desired to wind up voluntarily under supervision of the Court, and (2) that they hoped to carry out a plan of reconstruction which (if effected) would be beneficial to all concerned.

The petitioning creditors contended that even if the company resolved to wind up voluntarily under supervision of the Court, the date of bankruptcy would be not the time of the presentation of the present petition, but the time of passing the resolution, and that therefore the disposition of 15th August would not be invalidated.

The Court being of opinion that it was at least questionable whether the right to challenge the conveyance to the bank would be preserved if the company were wound up voluntarily under supervision in conformity with a resolution to that effect to be passed by the company, *granted* the application for compulsory winding up.

The 79th section of the Companies Act 1862 (25 and 26 Vict. cap. 89) provides, *inter alia*, that "a company under this Act may be wound up by the Court as hereinafter defined, under the following cirumstances (that is to say) . . . (4) whenever the company is unable to pay its debts; and (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up."

Section 91 of the Act provides, *inter alia*, that "the Court may as to all matters relating to the winding up have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence."

The Holmes Oil Company, Limited, was incorporated on 4th April 1884 under the Companies Acts 1862 to 1883, its registered office being at Holmes, Uphall, Linlithgowshire. Its nominal capital was £100,000, divided into 10,000 shares of £10 each, and the objects for which it was incorporated were to purchase or lease seams of shale and other minerals; to manufacture mineral products; to manufacture oil and all products of oil, shale, and petroleum; and kindred purposes.

On 3rd October 1900 the trustees of the late Robert Bell, who were the lessors of a shale field leased by the company, presented a petition to the Court, in which they craved an order for the winding up of the company by the Court.

The petitioners averred that they were unpaid creditors of the company to the amount of £4628, of which sum £1268 was overdue lordships, rent, &c., and the remaining £3000 was a claim of damages against the company in respect of its having allowed the mines leased to become flooded. They also averred that the company was unable to pay its debts or to implement its obligation to keep the workings in a good workable state.

The petitioners also produced a disposition dated 15th and recorded 17th August 1900, by which the company disponed to the Royal Bank of Scotland two pieces of ground extending to 5 roods 20 poles or thereby.

Answers were lodged on 16th October for the company. The respondents did not dispute that it was necesary that the company should be wound up, but averred that they had taken measures with the object of winding up the company with a view to reconstruction; that they had called a meeting of shareholders for 31st October, to which a complete statement of affairs would be submitted, and at which, if it was thought advisable, a special resolution for the winding up of the company would be passed; and that a meeting of creditors had been called for 16th October. They further averred that in the meantime it was believed that the interests of the company and its creditors would be seriously prejudiced if the company was forced into a judicial liquidation, as the prospects of